

# The Bureaucratization of the Judiciary

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The history of the twentieth century is largely the history of increasing bureaucratization. Almost every phase of American life has come to be dominated by large-scale, complex organizations—the corporation, the labor union, the university, the public hospital, and even our national political agencies. The national executive does not simply consist of the President and a small group of trusted advisers, but is instead composed of a vast, sprawling conglomerate of administrative agencies, which are staffed by more than three million (civilian) employees.<sup>1</sup> We have come to accept this and often refer to the executive branch as “The Bureaucracy,”<sup>2</sup> but a similar development has occurred within the legislature. In addition to some 500 senators and representatives, Congress now consists of about 40,000 employees, more than 300 committees and subcommittees, and 8 internal agencies (like the General Accounting Office and the Congressional Budget Office).<sup>3</sup> Against this background, an account of the judiciary, such as Cardozo’s,<sup>4</sup> that focuses exclusively on the agony of a lonely, isolated judge seems somewhat dated. Today the judiciary must be seen as a large-scale, complex organization.

My claim is not that the bureaucratic character of the modern judiciary is a legacy of the New Deal, the ostensible subject of this symposium. The interaction between the judiciary and the distinctive forms of government power legitimated by the New Deal may have contributed to and indeed exacerbated the bureaucratization of the judiciary;<sup>5</sup> but I do not believe that this particular interaction is the basic cause of the phenomenon. I attribute it instead to the growing size and complexity of American society. The judiciary should be seen as a coordinate source of government

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1. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981, at 268 (1981) [hereinafter cited as 1981 STATISTICAL ABSTRACT].

2. See, e.g., R.D. ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE (1979); W. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

3. See OFFICE OF THE FED. REGISTER, NAT’L ARCHIVES & RECORDS SERV., GSA, THE UNITED STATES GOVERNMENT MANUAL 1981/82, at 33-34, 48-67 (1981); 1981 STATISTICAL ABSTRACT, *supra* note 1, at 268. See generally U.S. GOV’T PRINTING OFFICE, 1983-1984 OFFICIAL CONGRESSIONAL DIRECTORY, 98TH CONGRESS 267-382 (1983) (listing Senate and House Committees); 1982 CONGRESSIONAL STAFF DIRECTORY (C. Brownson ed. 1982) (listing various staffs).

4. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

5. Fiss, *Two Models of Adjudication*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? (R. Goldwin & W. Schambra eds. 1985) (forthcoming).

## Bureaucratization of the Judiciary

power—an integral part of the state—subject to the same forces that have shaped the executive and legislative branches. The bureaucratization of the judiciary does not stem from the bureaucratization of the political agencies of the state, or from the interaction of the judiciary with them; it is instead a parallel development caused by the same forces—not the New Deal, not the advent of the administrative or activist state, but the very character of modern life itself.

From this perspective, this essay can be seen as a case study of the bureaucratization of governmental power (and as such, a companion to Professor Simon's essay).<sup>6</sup> It is, however, a case study with a special twist because in the context of the judiciary, bureaucratization poses a unique challenge to the legitimacy of governmental power. The legislative and executive branches derive their legitimacy from their responsiveness to popular will, and bureaucratization acts as a screen that impairs the responsiveness of officials within these branches. With the judiciary, however, the impact of bureaucratization is felt in another domain altogether: Bureaucratization tends to corrode the individualistic processes that are the source of judicial legitimacy.

The foundation of judicial power is process. Judges are entrusted with power because of their special competence to interpret public values embodied in authoritative texts, and this competence is derived from the process that has long characterized the judiciary and that limits the exercise of its power. One aspect of that process is independence. Judicial independence is not threatened by bureaucratization, and, indeed, today the independence of the judiciary from the political branches might depend on its capacity to develop the organizational resources usually associated with a bureaucracy. But a second aspect of the legitimating process of the judiciary is threatened. I am referring to the obligation of a judge to engage in a special dialogue—to listen to all grievances, hear from all the interests affected, and give reasons for his decisions. By signing his name to a judgment or opinion, the judge assures the parties that he has thoroughly participated in that process and assumes individual responsibility for the decision. We accept the judicial power on these terms, and yet bureaucratization raises the spectre that the judge's signature is but a sham and that the judge is exercising power without genuinely engaging in the dialogue from which his authority flows.

6. See Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

## I.

Not all organizational relationships are bureaucratic. The allocation of power to both state and federal courts creates a complex set of organizational relationships among the judges of the two political systems, but I regard these relationships more as coordinate than bureaucratic.<sup>7</sup> Similarly, I do not regard as bureaucratic the organizational relationships that arise from the fact that appellate courts today generally act through groups of judges. Interactions among the members of each group may create relationships that threaten the integrity of the judicial process, when, for example, compromises must be made to secure a majority, but I regard these relationships as more collegial or committee-like than bureaucratic.<sup>8</sup> For me, the feature that distinguishes bureaucracy from these other organizational relationships is hierarchy: The bureaucratic relationship is vertical rather than horizontal.

"Bureaucracy" is a term often used with pejorative connotations, because of the pathologies or dysfunctions connected with complex organizations, but I intend it more descriptively. I will use the term "bureaucracy" to refer to a complex organization with three features: (1) a multitude of actors; (2) a division of functions or responsibilities among them; and (3) a reliance upon a hierarchy as the central device to coordinate their activities. In stressing the hierarchical element, I do not mean to claim that hierarchy is the only coordinating device, for in bureaucracies of professionals, like the judiciary, hierarchy is often supplemented by a common culture—a set of shared norms and ideals. But this qualification does not destroy the central importance of hierarchy to the organization and the usefulness of the concept in analyzing a series of organizational relationships that characterize the modern judiciary.

I focus on the federal judiciary because it is often thought to be the fullest embodiment of the judicial ideal and also because it is considered the least bureaucratic of all our judicial systems. In this system, three hierarchical relationships can be identified: judge-judge, judge-staff, and what I shall call "judge-subjudge." Of all the hierarchical relationships, the first—the relationship between judges on different levels of the judicial system—is the weakest and, as is often true in bureaucratic organizations, those at the bottom of the hierarchy have considerably more power than the organizational chart indicates.<sup>9</sup> There is a gap between formal power

7. For a discussion of federalism as a coordinate system, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981).

8. For a discussion of the impact of committee-like relationships on the judicial process, see Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

9. See M. CROZIER, *THE BUREAUCRATIC PHENOMENON* 145-74 (1964) (identifying dynamics

## Bureaucratization of the Judiciary

and real power. This gap stems in part from the fact that the Supreme Court lacks the time, resources, and information needed to supervise the lower courts effectively. The Supreme Court fully considers around 150 cases a year while the federal courts of appeals alone produce 10,000 judgments a year.<sup>10</sup> Nor can the courts of appeals fill the supervisory void left by the Supreme Court. They are not organized to exercise managerial duties. Each court of appeals consists of a multitude of judges, who do not speak with one voice, and the control of each court is confined to a geographical region of the country and does not extend as broadly as federal law must—to the entire nation.

The hierarchy among judges is further weakened by the absence of any sanctioning system.<sup>11</sup> Contrary to the practice in most bureaucracies, those higher up in the judicial hierarchy have no authority over the appointment, removal, promotion, or pay of those below. Sometimes the especially obedient are rewarded by compliments in appellate opinions; sometimes the especially recalcitrant are publicly reprimanded; and sometimes judges high in the hierarchy will be consulted when a judge below seeks to move up. For the most part, however, the hierarchical control over judges is exercised through review of the work product of those below. And although the conscientious do not take such review lightly, it must be seen as a rather weak and indirect instrument of control. In 1980, Congress gave the judicial councils of the circuits power to investigate complaints against lower judges, but the sanctions stop short of removal.<sup>12</sup> The statute surrounds the judge accused of misbehavior with elaborate procedural protections, nearly equivalent to those available in a criminal prosecution, and specifically provides that a complaint may be dismissed if it relates to the merits of a decision. In many respects, the new legislation stands as a symbol of the weakness of the controls of one judge over another.

The second hierarchical relationship is that between a judge and his staff. Some of that staff—for example, the clerk of the court, the bailiff, and the judge's secretary—generally do not participate in the decisional process, and for the purposes of examining how bureaucratization affects

leading to divergence of real and formal power).

10. 1981 STATISTICAL ABSTRACT, *supra* note 1, at 185.

11. See Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 493-95 (1975) (only in "narrow area of binding lower courts . . . on remand" is there real control of lower court behavior).

12. The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, § 3, 28 U.S.C. § 372(c)(6)(B) (1982) provides a partial catalogue of "appropriate" sanctions: (1) certifying the disability of a judge; (2) requesting that a judge voluntarily retire; (3) ordering temporarily that no new cases be assigned to a judge; and (4) reprimanding a judge, either publicly or privately. In addition, the judicial council may refer any complaint to the Judicial Conference of the United States, which may, if it determines that impeachment may be warranted, refer the matter to the House of Representatives. *Id.* § 372(c)(7).

the integrity of that process, they can be safely ignored. Law clerks, however, cannot be ignored.<sup>13</sup> One must begin an analysis of their role by making a distinction between two types of law clerks: "elbow clerks," who are chosen by and work under the direct supervision of a particular judge, and "staff attorneys," who are not assigned to any particular judge but belong to what has become known as the "central legal staff." The staff attorneys seem to be confined to the courts of appeals.<sup>14</sup>

The role of staff in the decisional process is not publicly or formally defined, and in any event, varies from judge to judge and from court to court. Elbow clerks may write memoranda recommending how cases should be decided (referred to as "bench memoranda"), discuss cases with the judge, research issues that are not fully briefed, and draft opinions. Staff attorneys might do the same, but their primary function is to screen cases for appellate courts. A staff attorney usually prepares a memorandum for a panel of judges recommending whether a case should be disposed of summarily through issuance of a judgment order, rather than being fully argued and decided with a full opinion.

The third hierarchical relationship in the federal system is that between judges and certain auxiliary personnel such as magistrates, bankruptcy judges, and special masters, all of whom I call (borrowing a term from Geoffrey Aronow<sup>15</sup>) "subjudges." Subjudges participate in the decisional process, but fall somewhere between law clerks and judges in terms of their power. In contrast to law clerks, subjudges are formally and publicly entrusted with some measure of decisional power, and yet are distinguished from judges because of special restrictions on their power. The scope of their jurisdiction is especially limited (e.g., bankruptcy, pretrial discovery, habeas corpus petitions, or the trial of petty crimes). Their decisions are subject to review by a judge under more stringent standards than when one judge is reviewing the work of another judge. Subjudges serve for limited terms and are subject to the hierarchical controls—appointment and dismissal—that are not exercised by one judge over another. As a consequence, the hierarchy between judges and sub-

13. Nor have they been. See J. OAKLEY & R. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS: PERCEPTIONS OF THE QUALITIES AND FUNCTIONS OF LAW CLERKS IN AMERICAN COURTS* (1980) (empirical study of clerks in federal and California courts). A good deal of the recent public interest in law clerks stems from B. WOODWARD & S. ARMSTRONG, *THE BROTHERS* (1979).

14. On the role of staff attorneys, see Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253 (1980). Some circuit courts also have "settlement counsel" who try to facilitate, encourage, and maybe even pressure the parties into settlement. Sometimes persons called "screening clerks" or "pro se clerks" perform the function of staff attorneys. The Supreme Court does not formally have staff attorneys, but a comparable institution has evolved through the establishment of a pool of law clerks to screen certiorari petitions. Apparently six justices participate in this arrangement.

15. Aronow, *The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation*, 7 HASTINGS CONST. L.Q. 739, 742 (1980).

## Bureaucratization of the Judiciary

judges, like that between judge and staff, is stronger than the hierarchy among judges.

Putting together these three hierarchical relationships—judge-judge, judge-staff, and judge-subjudge—one can discern the familiar bureaucratic structure: a pyramid. The federal judicial system consists of three tiers of courts—the Supreme Court, the courts of appeals, and the district courts. Within each of these tiers is a shadow consisting of the law clerks or staff. The bottom tier has a second shadow, consisting of the subjudges, who are primarily used and supervised by the district judges. As a purely formal matter, this bureaucratic structure is not new. Almost every element of it can be traced back to the turn of the century, when Congress created the circuit courts of appeals and transformed the federal judicial system from a two-tiered to a three-tiered system.<sup>16</sup> What is new, and what has provoked the bureaucratization debate of recent years, is not the formal structure itself, but rather its internal density—the proliferation of participants within the structure.

In 1900, there were just over 100 federal judges—9 at the Supreme Court, 24 circuit judges, and 77 district judges.<sup>17</sup> Today there are more than 850.<sup>18</sup> In 1900, there were only 9 “stenographic clerks”—one for each justice.<sup>19</sup> The modern law clerk can be seen to have evolved from that position, but today the role of the clerk has become more important in the decisional process and the number of law clerks has greatly increased. There are approximately 1600 elbow clerks;<sup>20</sup> some judges have two, others three, and some four. The Chief Justice has five. The staff attorney is also new. Today there are 112 such clerks,<sup>21</sup> and it seems likely that their number will grow now that the position has been institutionalized and the need for screening cases has become more important.

Within recent years, a great deal of attention has focused on special masters.<sup>22</sup> This is probably due to the hotly contested and protracted na-

16. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (1891).

17. U.S. BUREAU OF THE CENSUS, 1 OFFICIAL REGISTER OF THE UNITED STATES 1275-1316 (1901).

18. ANNUAL REPORT OF THE DIR. OF THE ADMIN. OFFICE OF THE U. S. COURTS: 1982, at 3 (1982) [hereinafter cited as 1982 U.S. COURTS REPORT]. This figure includes 217 judges on senior status. The breakdown of authorized federal judgeships (as opposed to the number of judges) is as follows: Supreme Court (9), Courts of Appeals (132), District Courts (515). In addition, 16 new judgeships for specialized appellate courts have been authorized by the Federal Courts Improvement Act of 1982, § 105(a), 28 U.S.C. § 171(a) (1982).

19. See Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 301-03 (1961).

20. 1982 U.S. COURTS REPORT, *supra* note 18, at 34.

21. *Id.*

22. See Aronow, *supra* note 15; Berger, *Away From the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978); Harris, *The Title VII Administrator: A Case Study in Judicial Flexibility*, 60 CORNELL L. REV. 53 (1974); Kirp & Babcock, *Judge and Company: Court-Appointed Masters, School Desegregation, and Institutional Reform*, 32 ALA. L.

ture of the cases in which they are involved (e.g., school desegregation) rather than their number; in fact, their closest historical counterparts—the receivers of the railroad reorganizations at the turn of the century—were fairly numerous.<sup>23</sup> Attention has also focused on the subjudges used in the bankruptcy system, who for most of the twentieth century have been known as referees but are today called judges, even though they do not enjoy the full protection of Article III. In 1982, the Supreme Court declared unconstitutional the 1978 statute that effectuated this change of title and that also entrusted these officials with what the Court considered Article III duties.<sup>24</sup> Congress now has the choice, over which it has been especially divided, of elevating the bankruptcy judges to full judicial status, with life tenure and protection against pay reduction, or limiting their powers and duties.<sup>25</sup>

It seems to me, however, that the most significant subjudges are neither the special masters nor the bankruptcy judges, but the magistrates. They are not specialists but, in background and work, generalists much like the federal district judges. Magistrates handle matters as varied as habeas petitions and social security claims; they manage pretrial discovery, adjudicate petty crimes and, with the consent of the parties, can try all matter of civil cases. The present scheme contemplates close to 500 magistrates, which makes them almost as numerous as district judges (though almost half now serve on a part-time basis).<sup>26</sup> The commissioners, whom the magistrates succeeded, were also quite numerous (in 1900 they numbered over 1,100<sup>27</sup>), but this statistic obscures important distinctions. The contemporary magistrate is a lawyer and charged with more significant decisional responsibility than were the commissioners; and the magistrates' role will probably increase as Congress entrusts them with more responsibility and as the Supreme Court continues to remove the constitutional objections to this legislative program.<sup>28</sup> It is likely that, in time, the elabo-

REV. 313 (1981); Starr, *Accommodation and Accountability: A Strategy for Judicial Enforcement of Institutional Reform Decrees*, 32 ALA. L. REV. 399 (1981); Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neoreceiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161; Note, "Mastering" Intervention in Prisons, 88 YALE L.J. 1062 (1979).

23. See Martin, *Railroads and the Equity Receivership: An Essay on Institutional Change*, 34 J. ECON. HIST. 685, 688 (1974).

24. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

25. For the various proposals, see S. REP. NO. 55, 98th Cong., 1st Sess. 1-97 (1983); H.R. REP. NO. 9, 98th Cong., 1st Sess. 1-110 (1983).

26. JUDICIAL CONFERENCE OF THE UNITED STATES, *THE FEDERAL MAGISTRATE SYSTEM: A REPORT TO THE CONGRESS* 23 (1981) (489 magistrate positions—219 full-time, 270 part-time—are authorized as of October 1, 1981).

27. U.S. BUREAU OF THE CENSUS, *supra* note 17, at 1275-1316.

28. The magistrate system was first established in 1968, and over the next decade or so Congress intervened twice—once in 1976 and again in 1979—to strengthen the system and enlarge the duties of magistrates. JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 26, at 1-8. For a critical assessment of this trend, see Note, *Article III Constraints and the Expanding Civil Jurisdiction of*

## Bureaucratization of the Judiciary

ration of the magistrate system will create a permanent corps of subjudges and that the second shadow on the bottom level of the pyramid will become a fourth, but somewhat irregular, tier of the federal system.

### II.

With the growth of American society, it seems inevitable that the number of judges will increase. Nothing would be more absurd than to assume that the number of judges in 1900 would be sufficient to do justice in 1980. The claims of injustice have grown. Moreover, the social reality that must today be analyzed, and possibly reformed, by a judiciary determined to do justice is infinitely more complex, as are the sources of decision (e.g., precedents, statutes, and law review articles). It thus seems inevitable, and probably desirable, for the judiciary to turn to staff and other auxiliary personnel for help in discharging its duties. The number of personnel who participate in any judicial decision will therefore multiply, as will the total number of judges. Hierarchical relationships will then be created to coordinate the work of all these people and the judicial system will become bureaucratized.

To coordinate the work of all the judges, hierarchy is required by the sheer numbers involved and by certain political and legal imperatives—the need for uniform national norms and for consistent application of these norms. The professional culture judges share will facilitate coordination, and may indeed be necessary to support and temper the hierarchical relationships, but this common culture is not itself sufficient. Hierarchy is also necessary. On the other hand, the hierarchical relationships between each judge and his staff and between judge and subjudge are not attributable to size. Staff and subjudges are distributed to individual judges and to courts throughout the nation, and thus the number of persons whose work must be coordinated is quite limited. The work of a judge and his staff could conceivably proceed on a collegial or non-hierarchical basis. But there is a need for hierarchy between a judge and his staff, and also between a judge and the subjudges assigned to him, and it arises not from size but from inequalities inherent in the constitutional distribution of power: The power to adjudicate is given to judges, not to their staff or to subjudges.

From this perspective, therefore, the issue is not whether we have a bureaucracy, for bureaucratization, as I have defined the term, seems inevitable and perhaps desirable. The bureaucratization of the judiciary, like the bureaucratization of the world, cannot be avoided. The issue is

*Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023 (1979) (arguing that trial by magistrate impermissibly delegates Article III power).



instead a narrower one, namely, whether bureaucratic organizations produce pathologies or dysfunctions that threaten the foundations of the judicial process. If they do, and if we can identify those pathologies, we may be able to devise institutional arrangements that might contain or at least alleviate the dangers to the judicial process presented by a development that seems inescapable.

A.

There is a strong tradition in sociology, associated with the work of Max Weber, that identifies bureaucracy with rule-governed behavior: A Weberian bureaucrat is an official governed by a rule that prohibits him from taking into account individual circumstances.<sup>29</sup> According to this tradition, the bureaucratic pathology is excessively rigid behavior, which in turn stems from the obligation of the bureaucrat to adhere to the general rules that define the powers and duties of his office.

There is a question in my mind as to the validity of the Weberian emphasis on rules in any bureaucracy—it ignores the fact that general rules are only one type of hierarchical control<sup>30</sup>—but, at the very least, it seems that the Weberian emphasis has little import for the judicial bureaucracy. Rigidity is not one of its sins. Weber himself sensed this point. He did identify the bureaucratic mentality—thinking according to rules—with the legal mentality, and thus often described bureaucratic authority as a rational-legal authority; but he specifically acknowledged that the legal method of England and America (as opposed to that of the Continent) was not bureaucratic. Weber described Anglo-American adjudication as “empirical justice”: “[F]ormal judgments are rendered, though not by subsumption under rational concepts, but by drawing on ‘analogies’ and by depending upon and interpreting concrete ‘precedents.’”<sup>31</sup> Weber wrote these words in the early part of the twentieth century, but none of the developments in the intervening years has made his observation less apt.

One part of the judicial bureaucracy does seem to fit the Weberian model—the office of the clerk of the court. The clerk has general rules governing such matters as when briefs should be filed and on what size paper, and presumably he enforces these rules with some regularity. Such behavior no doubt angers many litigators, but there is no evidence (other

29. M. WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 220–21 (H. Gerth & C. Mills eds. 1946). For a new interpretation of Weber’s sociology of law, see A. KRONMAN, MAX WEBER (1983).

30. See Rudolph & Rudolph, *Authority and Power in Bureaucratic and Patrimonial Administration: A Revisionist Interpretation of Weber on Bureaucracy*, 31 WORLD POL. 195, 196–200 (1979).

31. M. WEBER, *supra* note 29, at 216.

## Bureaucratization of the Judiciary

than the occasional anecdote) suggesting that it is excessive, and in any event, those complaining about the bureaucratization of the judiciary are rarely concerned with the behavior of the clerks of the court.<sup>32</sup> The charge of bureaucratization is instead levelled at those who decide cases (the judges) and at those who participate in the decisional process (law clerks and subjudges). With respect to them, the Weberian emphasis on rigidity seems wholly inapposite.

To begin with, it must be remembered that general rules play an important and wholly legitimate role in any legal system. Adherence to rules is required by the very idea of the rule of law and by the maxim that insists upon a "government of laws and not of men." The charge must therefore be that the decisional process manifests *excessive* rule-bound behavior or *excessive* rigidity. No one has a standard for determining when adherence to general rules is excessive, but there are several reasons for believing that this condition does not now exist in the judicial bureaucracy and that it will not arise in the immediate future. There is all the difference in the world between the Prussian civil service and the federal judiciary, even in its present form.

The smaller the number of subordinates for each supervising official, the less the need to rely on general rules as a mechanism of controlling subordinates; and with respect to the judge-staff and judge-subjudge relationships, this number is relatively small. Recent years have seen a proliferation of staff, but the span of control for each supervising official (the judge) has nevertheless remained limited. Indeed, it is minuscule compared to that found in the bureaucratic organizations at the center of Weber's analysis. With respect to elbow clerks, a judge must at most supervise the work of four people, or, in the case of the Chief Justice, five. The same narrow span of control characterizes the relation between judge and subjudge. Special masters are usually appointed for a particular case, and the judge is not likely to use more than one. The total number of magistrates is significant, and likely to grow, but they are distributed throughout the United States, according to judicial districts, and as a consequence the span of control is also limited. Even in the busiest district, the Southern District of New York, eight magistrates are supervised by twenty-five district judges.<sup>33</sup> When the span of control is so narrow, judges are likely to avoid general rules and stress particularized methods of control, such as individual review of the official's work product.

The span of control in the judge-judge relationship has increased in

32. Some have worried about clerks of the court exercising decisional power, as for example, in the Fourth Circuit, where the clerk of the court is officially delegated the authority to rule on motions to recall the court's mandate.

33. Compiled from UNITED STATES COURT DIRECTORY (1982).

recent years to the point where only nine justices supervise roughly two hundred circuit judges, who in turn supervise more than six hundred district judges.<sup>34</sup> This has resulted in increased reliance on general rules, as is evidenced by the proliferation of uniform procedural rules (e.g., Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure, and the Federal Rules of Evidence). But there are three factors that operate to offset the drive toward rigidity that might otherwise arise from the increased use of general rules. One is the ideological commitment to "empirical justice," which shapes the content of the general rules and leaves them rather open-ended. Another is the role of lawyers, who are given considerable power to shape and control judicial proceedings and constitute the group from which judges are selected. Lawyers are usually commissioned by the specific and devoted to it, and they are likely to carry their perspective onto the bench. A third factor is the relative autonomy of the judges on the lower tiers of the pyramid. Although lower judges are as a formal matter bound by general rules, the hierarchy between judges is in fact so weak that they can often deviate from general rules with little fear of censure. Admittedly, judges exert stronger control over staff and subjudges than they do over other judges, but, as I pointed out earlier, the narrow span of control in these other relationships reduces the need for general rules. It is also true that judges are unlikely to expect their subordinates (staff and subjudges) to behave "bureaucratically" in the sense that Weber used the term. Judges are likely to structure their expectations in terms of their own self-image, and that consists of a complicated blend of the specific and the general.

### B.

For these reasons, I believe that the Weberian model does not fit the American judiciary. Excessive rigidity is not the danger. Given the hold of Max Weber on the sociological imagination and even on everyday usage (where the descriptive usage collapses into the accusatory, and bureaucratic dysfunction is often thought of as rigidity), one might be tempted to dismiss the charge of bureaucratization altogether. But that would be a mistake. There is another intellectual tradition concerned with bureaucratization that has great relevance for the judiciary. It consists of the work of Hannah Arendt, who identifies the pathology of bureaucratization in terms of its impact on the moral character of those who act within the bureaucratic structure. For Arendt, bureaucracy is not so much Weber's Rule by Rules as it is Rule by Nobody. The Arendtian pathology can arise even when the scale of bureaucracy is small and hierarchy is weak.

34. See 1982 U.S. COURTS REPORT, *supra* note 18, at 3.

Indeed, as we will see, weak hierarchy often exacerbates the corrosive effect of organizational complexity on individual responsibility.

Arendt's most sustained analysis of bureaucracy appears in her account of Eichmann, though it there appears only indirectly, largely to be inferred by the reader from her historical narrative.<sup>35</sup> Her method is to tell a story, in this instance about an operative within the Nazi organization charged with the task of transporting the Jews as part of a deportation program and later as part of the Final Solution. In Eichmann, Arendt sees the "banality of evil." By this Arendt does not mean that Eichmann was crass or ordinary, in the way that an uneducated or unsophisticated person might be (though Eichmann was that too), but rather that he was not motivated by some special hatred toward the Jews. He was not demonic but thoughtless. He did not fully consider (through the "soundless dialogue . . . between me and myself"<sup>36</sup> that, for Arendt, constitutes thinking) what he was doing. As she put it, in what I regard as the crucial sentence of the book, "He merely . . . never realized what he was doing."<sup>37</sup>

There is, of course, a question (of no concern to me here) as to the accuracy of this characterization of Eichmann. There is the further and more important question as to the explanation of this thoughtlessness—not what made Eichmann the person he was, which may be discovered in the details of his biography (of little interest to Arendt), but how a person could exercise the power Eichmann did and yet not realize what he was doing. It is here that bureaucracy emerges as a social structure that makes possible, facilitates, and perhaps even causes the thoughtless use of public power. This can occur in two ways. First, through the fragmentation and compartmentalization of tasks, bureaucracy insulates those acting within it from critical educational experiences. Giving the orders which result in transporting a Jew to a camp in which he might be killed is far different from arresting the individual, tearing him away from his home, bringing him to a camp, and clubbing him to death. The bureaucrat does not have to see or in any direct way experience the full scope of the organization's activities. Second, bureaucracy tends to diffuse responsibility. No single individual or group of identifiable individuals bears the full responsibility for the action of the organization. The organization's

35. H. ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (revised & enlarged ed. 1965) [hereinafter cited as *EICHMANN IN JERUSALEM*]. Arendt discusses bureaucracy as a "rule by nobody" in H. ARENDT, *On Violence*, in *CRISES OF THE REPUBLIC* 103, 137–38 (1972); H. ARENDT, *THE HUMAN CONDITION* 40, 44–45 (1958). Other dimensions of bureaucratization are discussed in H. ARENDT, *Lying in Politics*, in *CRISES OF THE REPUBLIC* 1 (1972) and H. ARENDT, *THE ORIGINS OF TOTALITARIANISM* 375, 398–409 (one vol. ed. 1973).

36. H. ARENDT, *THE LIFE OF THE MIND* 185 (one vol. ed. 1978).

37. *EICHMANN IN JERUSALEM*, *supra* note 35, at 287 (emphasis omitted).

action is the synthetic product of the action of individuals within the organization (many of whom are not identifiable) and the complicated network of relationships among these individuals, the "structure of the organization," which combines and refracts individual actions.

The fragmentation and compartmentalization of task that Arendt describes in the Nazi organization is in fact present in the American judiciary, and can insulate the judge from those critical intellectual experiences that should inform his judgment. To illustrate this danger, consider the use of the magistrate system to rule on motions to suppress confessions on the ground that they were coerced (a use which was recently sustained by the Supreme Court).<sup>38</sup> Under this system, it is the magistrate who first hears the evidence and applies the law. The magistrate announces a "recommended decision" and then transmits his decision to the judge, who can decide either to hold a full hearing on the motion or to accept the magistrate's decision on the basis of the written transcript. The judge can at that point listen to the grievance in all its particularity, make a decision, and then justify that decision; in this way, the judge can use the magistrate's inquiry as a supplementary procedure that better enables him to understand the issues. The issues will be tried twice. There is a great risk, however, that the judge will not use the magistrate in this way but instead delegate his decisional power by merely "rubber stamping" the magistrate's decision. When this happens, the judge does not genuinely consider what the privilege against self-incrimination means, either in the particular case or in general. The magistrate may well have considered what it means, but this is small consolation. The judge has lost the opportunity for the understanding and growth—the education—that comes from listening, deciding, and justifying a decision; and, after all, it is he and not the magistrate who is entrusted with the judicial power of the United States. There is also the danger that the uncertain division of decisional power—an ambiguity in the hierarchical relationship between judge and magistrate—will skew the magistrate's own decisions. He never fully knows whether he is responsible for actually deciding the coerced confession issue or for making a "recommendation" that will in time be fully scrutinized by a judge.

A case involves a fragmentation of human experience—it has a beginning, middle and end in the way that social life does not. It represents an artificial and necessarily truncated presentation of a specialized concern. Contemporary injunctive litigation of the structural variety has vastly expanded the parameters of what has been considered a "case," all to the good, but limits still exist. I complain of the bureaucratization of the judi-

38. *United States v. Raddatz*, 447 U.S. 667 (1980).

## Bureaucratization of the Judiciary

ciary not because it introduces limits where none exist but because it accentuates or aggravates the fragmentation of human experience that is otherwise endemic to adjudication and the idea of a case. In the example I discussed, one issue—the coerced confession claim—was taken out of the case and given to the magistrate to resolve while the judge played an ill-defined background role. The use of the magistrate insulates the judge from the presentation of the facts and the law on that particular issue, thus accentuating the incompleteness of his perspective, and it relieves him of some of his obligation to explain and justify.

The bureaucratic insularity that I have spoken about in the context of the magistrate does not arise from the proliferation of judges because that pathology requires a fragmentation of the judicial task—giving to someone else part of the job of judging—and neither the duties of a judge nor the parameters of a case are affected by the number of judges. Even with the multiplication of judges, each judge remains assigned to a case, and thus an increase in the total number of judges does not give rise to bureaucratic insularity. On the other hand, bureaucratic insularity is not confined to the magistrate system or the particular illustration I used. It arises with other subjudges as well, for example, a special master who is charged with the task of formulating and implementing a school desegregation decree. It also arises with law clerks. They have a role, as Judge Harry Edwards insists, in the judicial process, just as much as secretaries do.<sup>39</sup> They can help the judge in many of his endeavors; they can assist in research and, through argument and criticism, force the judge to re-examine his premises. To the extent, however, that critical components of the judicial process—I am not referring to the typing—are separated and delegated to others, so that the person who hears a case is neither the one who studies the issues, nor the one who decides the case, nor the one who explains or justifies the result, then the task of judging is fragmented, the judge remains insulated from various components of the process, and the same thoughtlessness that Arendt found in Eichmann may emerge in judicial guise.

Of course, the consequences of judicial thoughtlessness are unlikely ever to be as great or as horrible as those attributable to Eichmann's action—it is hard to believe anything could. On the other hand, in the judicial context, thoughtlessness is not just a personal failing nor one that might be evaluated in terms of the consequences it produces. It represents instead a failure of legitimacy. Thoughtlessness refers to the degeneration of the intellectual process through which a judge comes to know the law and

39. See Edwards, *A Judge's View on Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 259, 261-66, 268-69 (1981).

achieves his moral authority. A judge who exercises power without fully engaging in the dialogue that is the source of his authority—who leaves it to others to listen to a grievance or to explain a decision—is like a biologist who reports an opinion he has not tested by the scientific method. He may have hit upon the right result, but there is no reason for us to believe that he is right, or even that he is likely to be so. He has no claim to our respect. As Chief Justice Hughes insisted, “The one who decides must hear.”<sup>40</sup>

Bureaucratization, as Arendt suggests by her account of Eichmann, not only produces a dangerous insularity but also dilutes an individual’s sense of responsibility. To the extent that the work of the organization is divided among many people, and is shaped by the organizational structure, the individual need not accept full responsibility for the decisions or actions of the organization. With any organization this would be a loss, because no system of accountability, political or otherwise, will be wholly effective. We always have to rely on an individual’s sense of responsibility. With the judiciary the loss would be even greater. In part this is due to the political independence of the judiciary and the fact that a judge’s willingness to assume responsibility for his decisions constitutes the primary check on his power. Even more importantly, a sense of individual responsibility is necessary to animate and motivate the special dialogue that is the source of judicial authority: It supplies the judge’s reason for listening and explaining. Responsibility is the essential predicate for thoughtfulness.

The proliferation of staff and subjudges and the delegation of power to them weaken the judge’s individual sense of responsibility. The judge acts on the assumption that his work is the product of “many hands,”<sup>41</sup> and of the complicated network of relationships that exists among the individuals in his organization. The decision or opinion is not wholly his own. The relatively strong hierarchical relationship between the judge and his subordinates ensures that the judge assumes some responsibility for their work—he must answer for his staff—but this hierarchical relationship does not wholly compensate for the diffusion of responsibility that otherwise occurs.

For one thing, elements of weakness in the hierarchy remain, and they attenuate responsibility. The hierarchy is strongest between judge and elbow clerk and it can fairly be said that a judge is responsible for his clerks; on the other hand, the judge does not individually select or supervise the staff attorneys. They are not his. They are selected by the chief

40. *Morgan v. United States*, 298 U.S. 468, 481 (1936).

41. The phrase is from Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 AM. POL. SCI. REV. 905 (1980).

## Bureaucratization of the Judiciary

judge or some committee of judges, and as implied by the term "central legal staff," serve no particular judge, but the court as a whole. Similar distinctions could also be made between different kinds of subjudges. Special masters are chosen by the individual judge and work under his direct supervision. Magistrates, however, are chosen by a majority vote of the judges of the district court and are supervised by no individual judge. In the case of staff attorneys and magistrates the individual judge has only a weak duty of supervision, and he thus feels less responsibility for their work.

Moreover, the duty of supervision, even when it is very strong, is not a sufficient substitute for a primary duty like the duty to decide. This can be seen by assuming first that power is delegated by a judge to a special master to devise and implement a school desegregation plan, and second that the special master fails in the discharge of his duty, so that the desegregation plan is a disaster, from either a constitutional or pragmatic perspective. The judge bears some responsibility for this disaster; he could be said to have breached his duty of supervision by placing an inadequate person in charge or by not looking over the shoulder of the special master with sufficient care. But these breaches of the duty of supervision seem to be of a different and lesser order than would be attributed to the judge if he had formulated and implemented the faulty desegregation plan himself. The special master clearly bears some burden for failing to discharge the duty to decide (the primary duty), but he is not the official entrusted with the judicial power of the United States and he can deflect some responsibility for his failure onto the judge who appointed him, assigned him his task, and supposedly looked over his shoulder. In short, the breach of the two duties arising from the division of responsibility within a bureaucratic organization—a delegated duty to decide subject to supervision and the duty to supervise—does not equal the breach of a single individual responsibility within an individualistic framework. One-half plus one-half does not equal one, especially when the connector—the plus, the hierarchy—is weak or ill-defined.

Although I have focused on the relationship between judge and subjudge in order to explain why the duty of supervision does not wholly compensate for the diffusion of responsibility that occurs when the duty of judging is divided and various components are delegated, I believe that a similar analysis applies to the relationship between judge and staff. No matter how strong the hierarchical relationship, whenever the judge uses staff to discharge his duties he diffuses responsibility. A weak hierarchy only aggravates the problem. The analysis of the diffusion-of-responsibility issue in the context of the judge-judge relationship, however, is more complicated because responsibility among judges is supposed to be



shared: A judge is not free to shape the law as he believes is right. He is properly constrained by the interpretations of other judges. He need not accept full responsibility for his decisions in the way that he must when we consider his interaction with staff and subjudges. His responsibility is shared with other judges. This is the necessary implication of *stare decisis*, for it entails a sharing of responsibility over time, and it also arises from the hierarchical relationships that exists between judges on different tiers on the pyramid. A lower court judge must follow orders from higher judges and can rightly shift some measure of responsibility to those who issued the orders. A district judge may believe, for example, that the Constitution prohibits *de facto* as well as *de jure* segregation, but he is obliged by prevailing Supreme Court doctrine to turn his back on a claim attacking *de facto* segregation alone. His deference is justified by the various normative and institutional considerations that justify the hierarchical relationship among judges: equal treatment under the law, the aspiration for a uniform national law, and the role of the Supreme Court in our constitutional scheme.

In the modern world, judging necessarily entails a sharing of the power and responsibility of decision. The judicial power is exercised through a multitude of judges. We can acknowledge this fact and still be concerned about the endless increase in the number of judges because it splinters the judicial power and tends to reduce the power and responsibility of each individual judge for the law. Admittedly, we do not want judges to project their personal predilections; we want them to act as officials, disciplined by the norms of their office and profession. Yet we insist that each judge—as an individual and as an official—accept full responsibility for his decisions by signing his opinion and disclosing his vote. The proliferation of judges lessens the significance of that act for the individual judge and creates the need for complex organizational structures (e.g., informational systems) that inevitably come to shape the course of the law. Responsibility is shared with the multitude of other judges and with the impersonal forces and inanimate mechanisms that so pervade complex organizations. The Rule of Nobody becomes triumphant.

In a bureaucratic world, individual responsibility may give way to corporate responsibility: We may not be able to hold an individual executive responsible for the action of the organization, but we can hold the corporation responsible.<sup>42</sup> We may not be able to hold an individual judge re-

42. See C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 58-69 (1975); Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 *YALE L.J.* 1 (1980); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 *HARV. L. REV.* 1227 (1979); Note, *Structural Crime and Institutional Rehabilitation*, 89 *YALE L.J.* 353 (1979).

## Bureaucratization of the Judiciary

sponsible for an outcome, but, it might be argued, we can hold the judiciary—as a corporate entity—responsible. We can blame mistakes on the judiciary as a whole, and individual judges would share in that responsibility in some proportion to their role in the organization. Experience teaches, however, that corporate responsibility is a weak substitute for individual responsibility. Once individual responsibility is diffused or blurred to the degree that Arendt described, an organization can embark on, or drift into, a course of action that seems to have few limits. In the case of the judicial bureaucracy, this danger is particularly acute because the principle of judicial independence, amply protected by Article III, leaves the people served by the organization with very few means indeed for holding the corporate entity accountable. The public can do little more than reverse a particular decision or two, perhaps through a constitutional amendment, or restrict the jurisdiction of the organization. Such action might be intended as a repudiation of the organization's decision, but it scarcely constitutes a vigorous system of accountability and, in any event, paradoxically places the public in the position of reducing the workload of the organization while continuing to supply it with the same amount of resources.

### III.

Joseph Vining, in an important article on the subject, ends his analysis of the bureaucratization of the judiciary with a romantic glance backwards.<sup>43</sup> He invites us to rediscover the methods, largely of an individualistic character, that make law authoritative. He urges us to give "more attention to the underpinnings of law" and, on only a slightly more constructive note, pleads that we look "anew at the connections and distinctions between lawyers and the practitioners of other disciplines—all disciplines, not just the social sciences."<sup>44</sup> He believes that the bureaucratization of the judiciary can be reversed. I am less sanguine and, precisely because I share so many of his aspirations, feel obliged to speak more specifically about the issue of remedy.

Wade McCree is more specific, but his proposal—to ease the case load of the courts<sup>45</sup>—rests on questionable premises. First, the growing case load has not been the only cause of bureaucratization. The need for more

43. Vining, *Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 258 (1981).

44. *Id.*

45. See McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 793-97 (1981). Two Supreme Court justices also have spoken recently about bureaucratization, linking it to burgeoning case loads. Rehnquist, *Are the True Old Times Dead?*, MacSwainford Lecture, University of Kentucky (Sept. 23, 1982) (on file at the Public Information Office, Supreme Court of the United States); Powell, Remarks to the American Bar Association, Division of Judicial Administration (Aug. 9, 1982) (on file at the Public Information Office, Supreme Court of the United States).

staff, for example, stems not only from the increasing case load, but also from the increasing volume and complexity of the information to be processed in contemporary litigation. Recent antitrust cases like the suits against IBM and AT&T, to take the two most notorious examples, impose far greater informational burdens on the judiciary than did comparable cases at the turn of the century.<sup>46</sup> Second, increasing case load is itself the result of broader developments that are not within our power to reverse. Judge McCree (in part drawing on the work of Judge Friendly<sup>47</sup>) links the increased case load both to judicial innovation, which gives rise to new claims, and to the failure of the legislature to pass statutes of sufficient specificity. I doubt whether legislative enactments are today any more general than they were at the turn of the century (witness the Sherman Act<sup>48</sup>); I doubt even more whether fear of increasing the case load is a legitimate reason for denying a just but novel claim. Yet, even if we put these doubts to one side and accept Judge McCree's premises, he seems to have accounted for only a small part of the enormous increase in case load. The growing case load of the federal judiciary is not a function of the excessive generality of legislation, nor of excessive judicial innovation, but stems from the growing size and complexity of American society. The case load of the federal judiciary would be enormous today even if jurisdiction were cut back to what might be regarded as an irreducible "central core," for example, to claims arising under federal statutes and the Constitution.<sup>49</sup>

Questions of case load should not, of course, be ignored; the burden on the system should be reduced wherever possible. But it should also be understood that we will never deal adequately with the problem of bureaucratization and the threats bureaucratization pose to the integrity of the judicial process if case load is viewed as the exclusive, or even the primary, therapeutic target, and other dimensions of the problem are ignored. My suggestion is that we view the issue of bureaucratization from

46. See, e.g., *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

47. See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

48. Ch. 647, 26 Stat. 207 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)).

49. H. FRIENDLY, *supra* note 47, at 55. Judge Friendly concludes his effort to pare down the jurisdiction of the federal courts with a recognition of all that must remain:

We would expect the district courts and the courts of appeals to devote themselves to the great work for which they are uniquely equipped—assuring protection of rights guaranteed by the Constitution, enforcing civil rights legislation, dealing with controversies between the citizen and the federal government, applying the federal criminal law, interpreting and applying acts of Congress that furnish protection, both old and new, to consumers, investors and the environment, dealing with federal labor and antitrust legislation as well as such traditional federal specialties as admiralty, bankruptcy and copyright, and controlling the states so that congressional policy will not be impeded either by too niggardly or too expansive local requirements.

*Id.* at 197-198.

## Bureaucratization of the Judiciary

another perspective altogether—one that is defined by two premises. The first denies that adjudication is a discrete aberrational process, an intervention by the state needed now and then to settle a dispute that disrupts a just and harmonious society. Adjudication should be seen instead, like the interventions of the executive and legislative branches, as an exercise of collective power needed on an almost continuous basis to assure that social life conforms to the public values embodied in the Constitution and other authoritative legal texts. The need for judicial intervention will always be great; the case load of the judiciary will constantly grow; and the claims presented will make enormous informational demands upon the judges. Second, bureaucratization should not be seen as an isolated phenomenon occurring only in the judiciary. It is present in all forms of public authority, precisely because bureaucratization is tied to the increasing size and complexity of American society. Indeed, an increase in the organizational capacity of the judiciary (e.g., more judges and staff) may be preferable to the alternatives—constricting jurisdiction, thereby leaving claims of justice unanswered, or instituting mass-production techniques like rulings from the bench and summary dispositions, which threaten the legitimacy of the judicial power in an even greater way.<sup>50</sup>

Once the bureaucratization of the judiciary is understood as inevitable, and to some extent desirable, the organizational needs of the judiciary can be dealt with more explicitly. The managerial and adjudicatory functions of judges could be separated, as Judge Rubin has suggested, and new managerial structures, like a circuit executive, could be created to deal directly and explicitly with organizational needs.<sup>51</sup> Such an arrangement would reflect the fact that the special processes—dialogue and political independence—that have traditionally limited the exercise of the judicial power have no special role to play in resolving managerial questions. These processes may give judges a special competence to explicate public

50. The number of summary dispositions and bench decisions has grown steadily. See 1982 U.S. COURTS REPORT, *supra* note 18, at 83; U.S. Court of Appeals, Sixth Circuit, Annual Report, 1982 (on file with the Clerk of the Sixth Circuit). At the 1982 Second Circuit Judicial Conference, Justice Marshall pointed to a similar trend on the Supreme Court and condemned the “growing and inexplicable readiness on the part of the current Court to dispose of cases summarily.” Remarks of Justice Marshall, Second Circuit Judicial Conference, at 4 (Sept. 9, 1982) (on file at the Public Information Office, Supreme Court of the United States). Justices Stevens and Brennan have also criticized this same trend. *Board of Educ. v. McCluskey*, 458 U.S. 966, 971–73 (1982) (Stevens, J., dissenting, joined by Brennan, J., & Marshall, J.).

51. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 654–55 (1980). Richard Hoffman, the chief deputy clerk of the Court of Appeals for the District of Columbia, also emphasizes the need to separate managerial and adjudicatory duties, but he reports less-than-satisfactory experiences with the performance of circuit executives and instead urges an expanded use of circuit councils. Hoffman, *The Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 60, 65–66, 68–69, 72 (1982).

values, but they do not help in managing a complex organization and, in that domain, may in fact prove counterproductive.

Even more important, separating the legal and managerial duties of the judge's job will strengthen that fragile institution of judicial accountability—public criticism. Judges will remain responsible for both their legal and managerial judgments, but, once separated, each type of judgment will have to stand on its own. Each will have to meet a separate and distinct set of criteria. When these judgments are blended together in some indeterminate proportions, however, as they might have been in the *Reynolds v. Sims*<sup>52</sup> one person, one vote formula or in many of the doctrines fashioned by Justice Rehnquist to establish control over the lower courts,<sup>53</sup> those seeking to evaluate a judicial decision never know whether the proper standard is managerial or legal (but only that the managerial is becoming increasingly important). The problem is the one of the constantly moving target. Criticism will always be slightly inapposite and the prospect of an abuse of the judicial power that much more real.

Recognizing bureaucratization as an inevitable and, to some degree, desirable feature of the modern judiciary will also enable us to deal more effectively with the two bureaucratic dysfunctions—insulation from critical educational experiences and diffusion of responsibility—that threaten the moral foundations of the judicial power. It will lead to a remedial strategy that focuses on organizational design.<sup>54</sup> The issue is not whether we can eliminate bureaucratization altogether, but whether we can contain the dysfunctions or pathologies of bureaucratization, and certain organizational changes may help in that regard. These changes will not, to be sure, dismantle the judicial bureaucracy, for that is not our purpose nor is it even possible, but they may curb the dysfunctions and thereby preserve the integrity of the judicial process.

In order to expose judges first-hand to the underlying facts of a case

52. 377 U.S. 533 (1964). According to John Ely, the Court found itself with no alternative to the one person, one vote standard "precisely because of considerations of administrability." J. ELY, *DEMOCRACY AND DISTRUST* 124 (1980) (emphasis omitted). He was speaking about the difficulties a court might have applying a more nuanced standard in some particular case, but the point carries over to the difficulties one court might encounter in supervising the application of such a standard by another court. See also Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 247 (1968); Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 MICH. L. REV. 729, 748-49 (1969).

53. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 542 (1979) (Rehnquist, J., dissenting); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 489, 519-24 (1979) (Rehnquist, J., dissenting); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 418-21 (1977); *Rizzo v. Goode*, 423 U.S. 362, 373-81 (1976). For a discussion of the problem of control by appellate courts over "disobedient" judges in another era, see Note, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963) (discussing recalcitrance of Southern district judges in civil rights cases); see also J. BASS, *UNLIKELY HEROES* (1981) (role of Fifth Circuit in desegregation cases).

54. See generally O. WILLIAMSON, *MARKETS AND HIERARCHY* 132-54 (1971) (suggesting that alteration of organizational form of corporations can minimize dysfunctions).

## Bureaucratization of the Judiciary

and to ensure that judges are responsible for their decisions, an effort should be made to reduce the frequency with which judges appoint special masters. They have been appointed most frequently in cases seeking the structural reform of large-scale organizations, such as schools, prisons, or institutions for the mentally retarded, because of the special need those cases create in terms of social knowledge and representational structure. These cases are critical to a proper discharge of the judicial function and special masters can help to meet their special needs. But these needs can be met through alternative organizational forms, such as expert witnesses or amici, which do not involve a fragmentation and delegation of the judicial task and thus do not create the bureaucratic dysfunctions that arise from the use of special masters. The judge should therefore be pressed to explore alternative means of meeting the special needs of structural litigation before appointing a special master.<sup>55</sup> The appointment of a special master should be an option of last resort.<sup>56</sup>

When it is the judge who creates a subjudge like a special master there is special reason to be wary because the judge has incentives to do it for the wrong reasons—to shield himself from responsibility or to relieve himself from the drudgery that sometimes comes from total immersion in the particulars of a complex case. Thus, judicially created subjudges should be especially disfavored. But there are also reasons to be wary when the legislature creates subjudges, as it did with the magistrates.<sup>57</sup> The legislative creation of subjudges burdens judges with the duties of appointing, supervising, and deciding to retain the subjudges, thereby adding to their managerial tasks. It also brings into being a group of officials who tend to insulate judges from critical educational experiences and diffuse their responsibility. On this score, there is no difference between magistrates and special masters. This is not to deny the need that might have led Congress to the magistrate system in 1968—the rising case load—but only to suggest that there are good and important reasons for exploring alternative organizational forms for meeting these same needs.

One alternative is simply to create more district and circuit judgeships. In contrast to the proliferation of subjudges, increasing the number of judges does not create the bureaucratic pathology linked to the fragmenta-

55. Some have suggested that the role of special masters could be performed by United States trustees who would be located in the executive, or more particularly in the Department of Justice. See Hoffman, *supra* note 51, at 71. There is an irony to this suggestion, since the institution of the special master arose in response to the withdrawal of the Department of Justice from structural litigation in the late 1960's. See Aronow, *supra* note 15, at 746-47.

56. This may already be the established rule. See *La Buy v. Home Leather Co.*, 352 U.S. 249, 256-57 (1957).

57. See Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 265-66 (1980).

tion and compartmentalization of task—insulating the judge from critical educational experiences. An increase in the total number of judges does not make any single judge more insulated. It may, I admit, dilute judicial responsibility, because any increase in the number of judges will weaken each judge's sense of individual responsibility and create the need for new organizational structures (e.g., informational systems) to minimize the risk of inconsistent and unequal adjudication. But responsibility will be diffused—perhaps to an even greater degree—when subjudges are used to meet the need for more personnel, for subjudges multiply the number of decisionmakers and create the need for coordinating structures, and the subjudge alternative poses the additional dangers associated with bureaucratic insularity.

Subjudges might be cheaper than an increase in the number of judges and might seem to some less threatening to the elite status of the federal judge. I, however, doubt that the savings would be decisive and that the special status of the federal judiciary in any important sense depends on the number of judges in the system. It depends on their role in the political and social system. Justice Rehnquist, arguing the contrary, imagined an increase in the number of the district judges in Kentucky from nine to forty-one by the year 2027 and then asked: "Could anyone seriously maintain that the judicial 'coin' would not [be] somewhat debased by this great increase in its numbers?"<sup>58</sup> I could (depending on what he meant by "somewhat"). But even if I am wrong, and these relatively small changes in number are decisive, the fact of the matter is that the "coin" might have to be "debased" in order to avoid the bureaucratic pathologies—and maybe even constitutional objections—associated with meeting the contemporary need for adjudicatory personnel through the use of subjudges.

A second alternative to the use of subjudges is for Congress to create specialized tribunals that would stand outside the bureaucratic pyramid of the general federal system. The tax court and the court of military appeals are examples of what I have in mind. We may as a result end up with two or more smaller bureaucracies in the place of one mammoth bureaucracy, and lines of review would have to be created to the Supreme Court, but in terms of the integrity of the judicial process, more but smaller bu-

58. Rehnquist, *supra* note 45, at 15–16. Judge Posner recommends freezing the number of district court judges as a means of containing appellate case loads and thereby avoiding an increase in the number of appellate court judges. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 763–67 (1983). He too seems to believe that maintaining the special status of federal (appellate) judges is critically linked to limiting their number. Later in the same article, he suggests that increasing the number of federal appellate judges may be a "positive step" since it would reduce the concentration of federal power. *Id.* at 790.

## Bureaucratization of the Judiciary

reaucracies would be a gain. The larger the bureaucracy, the greater the diffusion of responsibility.

In the past, the creation of specialized tribunals has encountered two types of problems. One stems from the reluctance of Congress to endow specialized judges with Article III attributes—life tenure and protection against pay reduction. Indeed, only recently the Supreme Court struck down the bankruptcy court system for this very reason, and Congress appears to be responding to that decision with great reluctance.<sup>59</sup> In part the problem is transitional: In refusing to confer on the bankruptcy judges the protection of Article III, Congress is expressing a measure of unease with those who now happen to hold office and who would be elevated to judicial status under the reform. But as a wholly prospective matter, the congressional reluctance is hard to fathom. The most minimal regard for constitutional values and for the avoidance of needless conflict among the branches (*Ashwander*<sup>60</sup> transposed to the legislative process) should lead Congress to give the judges of whatever specialized courts it decides to create the independence that comes from life tenure and protection against reduction of salary. Independence is something that rightly belongs to any judge. Of course, the Article III formula is not the only way to ensure judicial independence, as is evident from the practices of various states, but it is difficult to identify any substantial interests that would be furthered by avoiding the dictates of Article III.

The dissenters in the recent bankruptcy case spoke of a need to preserve the “future options” of Congress in the face of a possible decline in the number of bankruptcy cases,<sup>61</sup> but this concern for budgetary flexibility seems, at least to me, a rather trivial reason for withholding Article III protection and for “experimenting” with other means of guaranteeing independence. To consider another reason sometimes offered for avoiding the dictates of Article III, namely, preserving the status of federal judges, let me say that although explicitly conferring Article III protections on specialized judges—who as a practical matter probably enjoy life tenure and whose pay is unlikely to be reduced—might enhance their status, it is difficult to see how this small increment of status would adversely affect the status of the federal district and circuit judges who would retain their more general jurisdiction.<sup>62</sup> Status derives from function, and the function

59. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); see *supra* note 25 (discussing congressional reaction to decision).

60. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341, 345–48, 355–56 (1936) (Brandeis, J., concurring).

61. *Northern Pipeline*, 458 U.S. at 118 (White, J., dissenting).

62. For a pointed suggestion of techniques available to Congress for preserving the special status of general federal judges against the specialist, without compromising the values of Article III, see *Northern Pipeline*, 458 U.S. at 74 n.28.



of the specialized judge must be secondary to that of the generalist who under our system will invariably be charged with enforcing the highest law.

Establishing specialized courts also raises questions about the value of a general, non-specialized perspective on legal issues.<sup>63</sup> There is an undeniable freshness and richness to the judgments of a non-specialist. There is also less chance of capture by a special interest group. I would not, therefore, establish a separate, specialized tribunal to deal with school desegregation, to mention one example, but rather would confine this strategy to areas where there is less value to the generalist's insight and less danger of capture. Tax and bankruptcy are perfect examples; admiralty may be another; so may patents (part of the jurisdiction of the new Court of Appeals for the Federal Circuit).<sup>64</sup> The standard should be, to borrow Justice White's phrase in the recent bankruptcy case, "extreme specialization."<sup>65</sup> We should realize, moreover, that we are considering the prospect of creating specialized tribunals under two very special assumptions—first, that we are unwilling to deal with the increased case load by the creation of new judges of general jurisdiction; and second, that we are comparing the specialized tribunal with the alternative of creating more subjudges, whose jurisdiction also tends to be specialized. Under these assumptions, the task is not to choose between the generalist and the specialist, but how to organize specialists. The issue is one of organizational form—whether we are, for example, to have bankruptcy referees or a bankruptcy court. Subjudges are specialists with considerable power (though perhaps a little less than a specialized tribunal would have). They would, in contrast to the specialized judges, also compound the managerial duties of the general judge, insulate those who decide from those who hear, and diffuse responsibility for decisions.

A remedial strategy that emphasizes alternative organizational forms also has implications for the use of staff. I start with the proposition that staff is indispensable to assist the judge in modern litigation—as indispen-

63. The arguments against specialized appellate courts are advanced by Judge Posner, *supra* note 58, at 775-91. He thinks even patent litigation is an inappropriate subject matter for a specialized tribunal because of its ideological content. *Id.* at 780-83. For a survey of the judicial specialization debate and a more receptive attitude toward specialized tribunals, see Jordan, *Should Litigants Have a Choice Between Specialized Courts and Courts of General Jurisdiction?*, 66 JUDICATURE 14 (1982); Jordan, *Specialized Courts: A Choice?*, 76 NW. U.L. REV. 745 (1981).

64. Federal Courts Improvement Act of 1982, § 101, 28 U.S.C. § 41 (1982). The jurisdiction of this new court may grow over time, as a way of dealing with various managerial problems within the federal system. Chief Justice Burger's most recent plan to ease the workload of the Supreme Court contemplates using panels of judges from this new court "to decide all intercircuit conflicts and possibly, in addition, a defined category of statutory interpretation cases." Remarks of Chief Justice Burger, Midyear Meeting of the American Bar Association 11 (Feb. 6, 1983) (on file at Office of Public Information, Supreme Court of the United States).

65. *Northern Pipeline*, 458 U.S. at 118 (1982) (White, J., dissenting).

## Bureaucratization of the Judiciary

sable as it is for the modern trial lawyer to be helped by a staff of young associates and paraprofessionals. It is possible, however, to organize the judicial staff in a way that minimizes bureaucratic pathologies. In the case of elbow clerks, who work under the immediate and direct supervision of a particular judge, the optimum organizational arrangement can be instituted by the judge himself. He simply should keep the clerk at his elbow—he should not delegate any critical component of the decisional process to the clerk and he should maintain strong supervision over whatever work the clerk is allowed to do. The judge will thereby avoid insulating himself from critical educational experiences and minimize the diffusion of responsibility that inevitably comes from the proliferation of staff. The judge should know that he will be held fully responsible for the work, style, and errors of his elbow clerks, and should organize his staff accordingly.

With respect to the staff attorney, however, we must consider a more radical and more formal change—abolishing the position altogether. This proposal stems from my belief that staff attorneys pose too great a risk of diffusing responsibility, precisely because they are responsible to no particular judge but only to the court in general. Staff attorneys usually work under the loose supervision of several judges, but their work is never imputed to any particular judge. They remain faceless, as does much of their work. Indeed, accompanying the advent of the staff attorney is the proliferation of anonymous edicts—the “judgment order” and the “per curiam”—which, oddly enough, are sometimes used to dispose of difficult and far-reaching questions.<sup>66</sup> The use of staff attorneys to screen so-called “meritless” cases not only produces an anonymous form of justice, but tends to insulate judges from the ebb and flow of the law and the full impact of the grievances presented. Judges may need more staff in order to work through their increasing case load and to help in more complex cases, but their staff should be organized in a way that reinforces rather than diminishes the judge’s sense of responsibility, and that increases rather than reduces his participation in the dialogue that is the source of his authority.

These suggestions—curbing the use of special masters and other sub-judges such as magistrates, strengthening the supervision of elbow clerks, and eliminating staff attorneys altogether—are not meant to be exhaus-

66. See, e.g., *United States v. Hubbard*, 686 F.2d 955 (D.C. Cir. 1982) (per curiam) (ordering no disclosure of Church of Scientology documents); *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982) (per curiam) (ruling on suppression motions in trial of person charged with attempt to assassinate President). A similar use of the anonymous edict appears on the Supreme Court. See, e.g., *Maryland v. United States*, 460 U.S. 1001 (1983) (per curiam) (summary affirmance of provisions of AT&T antitrust decree); *Buckley v. Valeo*, 424 U.S. 1 (1975) (per curiam) (invalidating portions of federal campaign finance statute).

tive. They are meant only to indicate the range of alternatives possible within a remedial strategy that seeks to end the obsession with case load and to invite attention to issues of organizational form. They are intended only to render that remedial strategy credible; the list of particular suggestions can and must be continued. I must admit, however, that even when that list is continued, we will be left with a judiciary that is bureaucratized—a highly complex organization that is characterized by a number of hierarchical relationships and that tends to insulate judges from critical educational experiences and to diffuse responsibility. This seems to me to be part of the modern predicament. The world changes—we move from a society of individuals to a society of organizations—and yet we find we must live and work with forms of authority that presuppose a world that no longer exists and that is beyond our power to recall.

The response to this predicament should not be resignation or despair. It would be a mistake to conclude from this analysis that we should renounce the judicial power, as though we have some other way of protecting our public values and checking the political branches of the activist state. There are instead two other possibilities. One is to reexamine our individualistic ideals and the forms of authority to which they give rise; maybe, as Bruce Ackerman suggested at a carefree luncheon, when I was about to begin this paper, bureaucracies can engage in dialogue. The other and, to my mind, more realistic alternative is to search for those small incremental changes in institutional design that may enable us to realize more fully our individualistic ideals within a world of a wholly different character.